TABLE OF CONTENTS.

Preliminary Statement 1

Argument 2

1. The ruling of the Court below that there was no duty under these facts, "for the owner to speak or otherwise interfere with the authority of the master of the vessel" is not in conflict with any decision of this Court, nor with any decisions of the various Circuits 2

2. The decision below is not in conflict with the decision of this Court in *Vaughan v. Atkinson*, 369 U.S. 527 7

3. There was no issue of credibility before the Court below. Upon an examination of the entire record it ruled that the findings of the District Court were clearly erroneous. This was entirely within the scope of appellate review 9

Conclusion 11

TABLE OF AUTHORITIES.

Cases.

Admiral Towing Company v. Woolen, 290 F(2d) 641 (1961) 6

Avera v. Florida Towing Co., 322 F(2d) 155 (CCA5, 1963) 2, 5

Cleveco, The, 154 F(2d) 605 (CCA6, 1946) 2, 4

Cox v. Esso Shipping Company, 247 F(2d) 629 (CCA5) 10

Fall v. Esso Standard Oil Co., 297 F(2d) 411 (CCA5) 10

Lake Shore and Michigan Southern Railway Co. v. Prentice, 147 U.S. 101 8

Merry Manufacturing Company v. Burns Tool Company, 335 F (2d) 239 ---------- 9

Spencer Kellogg & Sons v. Hicks (The Linseed King), 285 U.S. 502 ---------- 2

States Steamship Co. v. United States, 259 F(2d) 458 (CCA9, 1958) ---------- 2, 5

United States v. United States Gypsum Co., 333 U.S. 364 ---------- 9

Vaughan v. Atkinson, 369 U. S. 527 ---------- 7

Other.

Federal Rules of Civil Procedure:

Rule 43(b) ---------- 10

Rule 52(a) ---------- 9

Gilmore and Black, The Law of Admiralty ---------- 4, 5-6

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1456.

ALICE MARIE LAMP,
Administratrix of the Estate of Frank Donald Lamp, Deceased, et al.,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

The litigation involved herein arises out of the collision between the Steamer Cedarville and the Motor Vessel Topdalsfjord in the Straits of Mackinac on May 7, 1965. Two Petitions for Writ of Certiorari have been filed herein seeking a review of the judgment of the United States Court of Appeals for the Sixth Circuit which reversed the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

United States Steel Corporation is the respondent in this proceeding as well as the one bearing the title and number as follows:

> Barbara J. Fuhrman, Administratrix of the Estate of Arthur J. Fuhrman, Deceased, et al., Petitioners, vs. United States Steel Corporation, Respondent, October Term, 1968, No. 1403.

The Respondent has filed its Brief in Opposition to the Fuhrman Petition. Inasmuch as the questions and issues of the two Petitions are similar, and for the purpose of avoiding needless repetition, we respectfully request this Court to treat the Brief in No. 1403 as though embodied herein and fully rewritten. The instant Brief, as far as possible, will be confined to a consideration of such new matter as is presented by counsel for this group of claimants.

ARGUMENT.

1. The ruling of the Court below that there was no duty, under these facts, "for the owner to speak or otherwise interfere with the authority of the master of the vessel" is not in conflict with any decision of this Court, nor with any decisions of the various Circuits.

Counsel for the Petitioners assert that the above-mentioned ruling is in conflict with the decision of this Court in *Spencer Kellogg & Sons v. Hicks (The Linseed King)*, 285 U.S. 502; with *The Cleveco*, 154 F(2d) 605, 613 (CCA6, 1946); with *Avera v. Florida Towing Co.*, 322 F(2d) 155 (CCA5, 1963); and with *States Steamship Co. v. United States*, 259 F(2d) 458 (CCA9, 1958). (Pet., p. 5) We shall consider the alleged conflicts in that order.

As this Court is aware, *The Linseed King, supra*, involved the "privity or knowledge" of the vessel owner and the right to limit its liability. There, the Master had disobeyed the vessel owner's instructions not to operate the launch when ice was in the river and this violation took place within the knowledge of the owner's works manager. This Court ruled that the conditions on the morning in question could have been ascertained by him and that

his failure to do so, combined with his failure to make sure that the launch stayed at the dock, was the cause of the disaster.

This Court, speaking through Mr. Justice Roberts, pointed out the distinction between the above situation and the one where the emergency must be met by the Master alone. At 285 U.S. page 511, this Court said:

> "* * * Cases such as *LaBourgogne,* 210 U.S. 95, which involved the master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. *But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone.* In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. * * *" (Emphasis supplied)

There is no evidence in this record which supports counsel's assertion that the owner of the Cedarville knew that she was bound to sink. (Pet., p. 11) It is an undisputed fact that she remained afloat for forty minutes in spite of her construction, the collision damage, her position in the water and the 14,411 tons of cargo she was carrying. The time that an injured vessel will remain afloat cannot, for obvious reasons, be determined with mathematical exactness. The world now knows that the post-collision life of the Cedarville was forty minutes. That was something which neither her Master nor her owner could possibly know at the time the attempt to reach the beach was made. Had Captain Parrilla, or other officials of

United States Steel, without knowledge of the conditions at the scene of the collision, including visibility, the sea, the presence of other vessels and the condition of the Cedarville, nevertheless ordered Captain Joppich to abandon ship and men had been lost, these same attorneys would have been the first to contend that judgment as to what should be done should have been left to the man at the scene and that interference with the Master's discretion constituted wanton and malicious conduct on the part of the company officials.

Counsel stresses the rapidity of modern-day communications as justification for interference with a Master's authority. (Pet., p. 11) The ability of a vessel owner to communicate speedily with a Master does not change in any way the fact that he, and he alone, is responsible for the navigation and handling of his vessel and that he must be left free to exercise his own judgment.

Counsel quotes from *Gilmore and Black, The Law of Admiralty* (Pet., p. 10). It should be pointed out that there, also, the authors were dealing with the "privity or knowledge" of the vessel owner, within the framework of the right to limit liability. The right to limit is against liability for compensatory damages and their discussion has no bearing upon the factors which must be present in order to sustain an award for punitive damages.

The only references in the Petition to *The Cleveco, supra,* are in paragraph 2 under "Reasons for Granting the Writ" and in the "Conclusion" (Pet., pp. 5, 19). That case involved the sinking of a tug and barge in a storm, as a result of the unseaworthiness of the tug because of her instability. The owner of the vessels was denied the right to exoneration from and limitation of its liability because its marine superintendent either had knowledge of that instability or the knowledge was available to him. The

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binding effect of the knowledge of the marine superintendent upon the vessel owner, as establishing "privity or knowledge," is uniformly recognized. As far as anyone knows, those on board the Cleveco went down with her. The decision to stay aboard in the hope that they would be rescued was that of her master.

Avera v. Florida Towing Co., supra, is another decision involving "privity or knowledge" in a limitation of liability proceeding and posed the narrow question as to whether the president and general manager of the owner of the tug had the duty, with the tug still at the dock, to make inspection and inquiry which would have revealed Avera's presence on the tug, in violation of specific instructions given to the master. In ruling, within the context of "privity or knowledge," that the "measure" of the knowledge "is not what the owner knows, but what he is charged with finding out," the Court ruled that the owner was chargeable with knowledge of Avera's incompetence and was responsible for the master's negligence in hiring him. The Court did not have before it and, therefore, did not reach the issue as to the control, if any, to be exercised over the master of a vessel which is on a voyage and away from the presence of her owner.

An examination of *States Steamship Co. v. United States, supra,* revealed that the vessel was lost by reason of a crack in her hull and a defective steering gear. Limitation of liability was denied because the vessel owner had not used due diligence to make the vessel seaworthy at the inception of her voyage and that her unseaworthiness was within the privity or knowledge of her owner. This case involved failure to take steps to make the vessel seaworthy while she was still at the dock and before she began her ill-fated voyage. The quotation from this case set forth on page 13 of the Petition is from *Gilmore and*

Black. The language of the authors, including the portion quoted, is as follows (p. 474):

> "* * * The reason for this 'vast difference' there stated is well described by *Gilmore and Black* as follows (p. 696): 'The principle of the Limitation Act is the same as found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a normal control over his "servants" once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance.* * * *' "

All of the foregoing cases are distinguishable from the case at bar. In addition to the "privity of knowledge" issues which are present in all of them, and not here, they, without exception, involve vessels where matters relating to their seaworthiness were subject to the effective control of their owners before they departed.

The question of "control" by the vessel owner when the vessel is at sea received the consideration of the Ninth Circuit Court of Appeals in *Admiral Towing Company v. Woolen*, 290 F(2d) 641 (1961) where that Court said, at page 648:

> "* * * There will surely come a case where the unlimited agent is the master of a vessel and the causative negligence is an error in seamanship resulting from a spur of the moment decision. To impute the master's mistake to the shipowner in such a situation simply because the master has been given broad and unlimited agency powers over the operation and maintenance of the vessel, would be to rob the shipowner of just that protection which the Limitation Act was

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apparently designed to afford him: immunization from instantaneous negligence on the part of the master at sea, negligent behavior over which the shipowner could not possibly exercise control. See *LaBourgogne*, 1908, 210 U.S. 95, 123, 28 S. Ct. 664, 52 L. Ed. 973; *Gilmore & Black, Admiralty* § 10-22 (1957). * * *"

The ruling of the Court below is consonant with the principle that in this type of emergency at sea, the decisions must be those of the master of the vessel. None of the cases upon which opposing counsel rely are to the contrary.

2. The decision below is not in conflict with the decision of this Court in Vaughan v. Atkinson, 369 U.S. 527.

The contention made by opposing counsel that the decision below contravenes *Vaughan v. Atkinson, supra,* is based upon the double premise that the duty to control existed and the failure to exercise that control constituted a "wanton and intentional disregard of the legal rights of seamen." (Pet., pp. 13, 14) For the reasons discussed elsewhere, the duty to control did not exist. In the absence of such a duty, the legal effect of the failure to act becomes moot.

In *Vaughan v. Atkinson, supra,* the only discussion of exemplary or punitive damages occurs in the dissenting opinion of Mr. Justice Stewart (369 U.S. at page 540). It was his view that the case should be remanded to the District Court to determine whether the shipowner's refusal to pay maintenance was "intentional and wanton." This Court, in reversing and awarding counsel fees as damages found that the vessel owner was callous and recalcitrant in its refusal to pay. (369 U.S. at page 531) This involved the actions and attitude of the vessel owner

itself. Corporate liability, as such, was not an issue. The distinction between that situation and the one at bar is clear.

This Court in *Lake Shore and Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, announced, and it is still the law, that corporate liability for punitive damages does not exist in the absence of participation in the offence. In that connection, this Court said (p. 107):

> "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, *can only be awarded against one who has participated in the offence.* A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this Court in the case of *The Amiable Nancy*, 3 Wheat. 546." (Emphasis supplied)

If the decision by Captain Joppich to attempt to beach the Cedarville constituted the "offence," which we dispute, then opposing counsel must not only establish a participation in it by Admiral Khoury and Captain Parrilla, but wantonness, wilfulness and recklessness on their part. This, they cannot do.

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3. There was no issue of credibility before the Court below. Upon an examination of the entire record it ruled that the findings of the District Court were clearly erroneous. This was entirely within the scope of appellate review.

Counsel for United States Steel, in the Court below, urged that the clearly erroneous standard set out in Rule 52(a) F.R.C.P. was not applicable because the entire record consisted of depositions, the reading of various portions of Coast Guard investigation records and other written evidence. (Appendix, p. 77) This contention was rejected. The Court ruled that Rule 52(a) was applicable notwithstanding the absence of live testimony at the trial. It applied the standard announced by this Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, and then stated (Appendix, p. 79):

> "After a careful review of the record, we hold that the findings of the District Judge to which we have referred above and upon the basis of which the District Judge awarded punitive damages against United States Steel are clearly erroneous."

Where, as here, the findings of the District Judge were challenged, it became a primary obligation of the Court below to determine whether, in the words of this Court in the *Gypsum* case, *supra*, it, based upon the entire evidence, "is left with the firm conviction that a mistake has been committed. 333 U.S. at 395."

The rulings of the United States Court of Appeals for the Fifth Circuit are not to the contrary. In *Merry Manufacturing Company v. Burns Tool Company*, 335 F(2d) 239 (cited by opposing counsel, Pet. p. 17), that Court declined to resolve questions of credibility but accepted the obligation of determining whether the challenged findings were or were not clearly erroneous.

In describing the statements of Captain Joppich as self-serving, the Court below did not question his credibility. It had the right to evaluate the weight of his testimony and concluded that it did not establish that United States Steel, as a general practice, had ordered its ships to proceed at full speed in heavy fog and not to follow the alleged recommended courses. (Appendix, p. 79) The evaluation of the testimony of Captain Joppich was part of the evaluation of the entire record which was a necessary part of the reviewing process. No other method, of which we are aware, has been devised to determine whether the findings of a trial court are, or are not, clearly erroneous.

Opposing counsel have cited no decisions which are authority for the proposition that a master of a vessel may make a binding admission concerning the overall custom and practice of his employer. In *Cox v. Esso Shipping Company,* 247 F(2d) 629 (CCA5), cited by them (Pet. p. 17), the Court ruled that the exclusion of a master's report to the Coast Guard concerning the seaworthiness of an appurtenance of the vessel constituted error. The declaration contained in the report was within the master's authority. That authority, for obvious reasons, does not extend to matters which relate to the general operation of the vessel owner's business. *Fall v. Esso Standard Oil Co.,* 297 F(2d) 411 (CCA5), also cited by opposing counsel (Pet. p. 17), simply stands for the proposition that a Chief Mate, who was in charge of the vessel in the absence of the Master, should be treated as a managing agent within the scope of Rule 43(b) F.R.C.P., and subject to cross-examination by the plaintiff.

At this juncture it should be pointed out that the principal issue before the Court below was whether justification existed, based upon the record, for the awarding

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of punitive damages. It is significant, in that connection, that none of opposing counsel have cited a single decision in which the failure of a Master of a vessel to obey the Rules of the Road or approval of that conduct by a vessel owner constituted justification for the imposition of such damages. For that to exist, the elements of wantonness, wilfulness and recklessness must be present.

The issues discussed by opposing counsel emphasize their factual character. A review of those facts by this Court would seem to be unwarranted.

CONCLUSION.

The decision below is important to the maritime industry because it constitutes a reaffirmation of the doctrine that the Master of a vessel is all that the name implies. It is not true that those ashore possess greater navigational and vessel handling expertise and they have the marked disadvantage of not being on the scene. If it should ever become the law that the Master is no longer in sole command of his vessel and that his authority may be usurped at will, the implications could be far reaching and tragic.

This Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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